

**United States Department of Labor
Employees' Compensation Appeals Board**

C.R., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Detrick, MD, Employer**

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**Docket No. 16-0828
Issued: September 12, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 15, 2016 appellant filed a timely appeal from a February 8, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On August 12, 2015 appellant, then a 62-year-old supervisory biological science lab technician, filed an occupational disease claim (Form CA-2) alleging hearing loss causally related to factors of his federal employment. He explained that he worked in cage wash and caretaker positions from December 1984 to August 2009. Appellant indicated that he was subjected to daily loud noises and that ear protection was not required until approximately three

¹ 5 U.S.C. § 8101 *et seq.*

to four years prior to the filing of his claim. He indicated that he first became aware that his condition was caused by his federal employment on May 19, 2015. The employing establishment noted that appellant had been promoted to a supervisor in August 2009 and was thereafter no longer subjected to daily noise exposure.

By letters dated August 19, 2015, OWCP requested additional information from appellant and the employing establishment.

In a September 3, 2015 statement, appellant described his exposure to noise from August 1972 to the present. He advised that in his most recent position, he continued to be exposed to intermittent noise. Appellant indicated that on May 19, 2015, when tested as part of his annual examination, he received an audiogram that revealed hearing loss. He advised that he also had a claim with the Department of Veterans Affairs, filed November 19, 2012, for service-connected hearing loss.²

OWCP received an August 7, 2014 survey report for an animal husbandry position that included noise exposure levels. The levels for cage washing were indicated to be at 85 decibels or above. OWCP also received hearing conservation reports and audiograms dating from February 14, 1985 through March 27, 2013, as well as other personnel records.

On September 10, 2015 OWCP received an undated response from K.E., the Chief, Department of Animal Husbandry, at the employing establishment. K.E. confirmed that the information provided by appellant was accurate and that he had worked with appellant since early 1996. He confirmed that appellant had been with the employing establishment since December 1984 and had worked in all areas of the building dealing with laboratory animal husbandry. K.E. explained that appellant worked with the animal cage washing equipment, such as rack and tunnel washers, and was responsible for moving cages and other equipment throughout the facility. He noted that most of these items were made of stainless steel construction and rolled on hard plastic rollers that could be very loud. K.E. explained that appellant's duties typically involved daily, prolonged exposure to the noise hazards as described in the provided surveys. In most cases, the exposure would be eight hours per day, five days per week. In many cases, the duties would also be performed on weekends and holidays, adding more time to the standard workweek. K.E. advised that standard disposable foam earplugs were provided. He also provided documentation related to appellant's employment. K.E. advised that appellant still had intermittent exposure to noise hazards for approximately two hours per day, two to three days per week.

In a letter dated October 30, 2015, OWCP advised appellant that additional medical evidence was needed. In a statement of accepted facts (SOAF), it accepted that from August 1974 to July 1976 he worked for the U.S. Air Force in flight line maintenance and was exposed to jet engine noise eight hours a day, five days a week. From December 20, 1984 to the present, appellant worked for the employing establishment in various positions and was subjected to various degrees of noise exposure.

² The record reflects that appellant worked for the U.S. Air Force in flight line maintenance and was exposed to jet engine noise eight hours a day, five days a week from 1974 to 1976 and had a service-connected disability. Appellant also had a preexisting right ear condition.

The SOAF indicated that from December 20, 1984 to December 14, 1985 when appellant worked as a laboratory worker, he was exposed to an average of between 84.2 and 92.7 decibels of noise without ear protection; from December 15, 1985 to August 2, 2008 when he worked as an animal caretaker, he was exposed to an average of between 84.2 and 92.7 decibels of noise with mandatory hearing protection; and from August 3, 2008 to the present, when working as a biological science laboratory technician (Animal), he was exposed to an average of 82 decibels of noise with mandatory hearing protection. He was also exposed to jet engine noise eight hours a day, five days a week when he worked for the U.S. Air Force in flight line maintenance from August 1974 to July 1976.

By letter dated November 2, 2015, OWCP referred appellant for a second opinion examination, along with a copy of the SOAF, a set of questions, and the medical record to Dr. Bibhas C. Bandy, a Board-certified otolaryngologist.

In his November 17, 2015 report, Dr. Bandy noted that appellant was seen for evaluation and management of his gradual hearing loss in both ears, worse in the right. He indicated that appellant had suffered with continuous ringing noise in both ears for several years. Appellant also had infrequent momentary loss of balance, but no objective vertigo and no hearing fluctuation at the time of ataxia. Dr. Bandy noted appellant's history of federal employment and his exposure to frequent loud noise exposure up to eight hours daily. He advised that appellant also had noise exposure in the Air Force. Dr. Bandy related that appellant had no other noise trauma in his home life. Appellant noted a history of recurrent childhood otitis media and right-sided tympanoplasty surgery when he was a teenager. After surgery he had no otorrhea, or drainage, from the right ear but hearing did not improve significantly. Dr. Bandy examined appellant and diagnosed right-sided moderate-to-severe mixed hearing loss due to adhesive tight middle ear cavity disease with possible ossicular chain disruption or loss of normal alignment. Appellant had tympanosclerosis of right eardrum and middle ear cavity and possible stapes fixation in right ear.

Dr. Bandy found bilateral high-tone moderate-to-severe sensorineural hearing loss due to possible noise exposure, mild deviated nasal septum with chronic rhinitis, and tinnitus both ears. He noted that appellant had significant hearing loss in the right ear, mixed type, with large air bone gap. Dr. Bandy found a good cochlear reserve in both ears. When asked if appellant showed sensorineural hearing loss in excess of what would be expected on the basis of presbycusis, he responded: "yes to a certain extent." Dr. Bandy responded "yes" with regard to whether the sensorineural hearing loss was due to appellant's federal employment. In comparing appellant's current hearing loss to that at the beginning of his exposure, he advised that "to a certain extent" the hearing loss was in excess of what would normally be predicted on the basis of presbycusis. Dr. Bandy recommended a hearing aid for the right ear. He indicated that he did not see active right ear infection for which appellant needed any medical treatment. Audiometric test results included verification by a certified audiologist on November 12, 2015. Dr. Bandy found that appellant sustained hearing thresholds of the right ear at 500, 1,000, 2,000, and 3,000 cycles per second of 65, 60, 65, and 50 decibels, respectively and to the left ear at 500, 1,000, 2,000, and 3,000 cycles per second of 15, 20, 25, and 30 decibels, respectively.

OWCP requested that its district medical adviser (DMA) provide an opinion on impairment. In a January 17, 2016 report, the DMA noted that, per the SOAF, prior to appellant's federal employment for the period August 1974 to July 1976, he had worked for the

U.S. Air Force in flight line maintenance where he was exposed to jet engine noise eight hours a day, five days a week. He also noted that he had a history of right ear disease requiring a tympanoplasty. The DMA explained that these two issues were responsible for the preexisting right ear hearing loss observed when appellant was first tested by the employing establishment in 1985. He explained that it was important to note that appellant had worked for the employing establishment for only two months before the first test was performed on February 14, 1985 and advised that this was not enough exposure time to cause or aggravate noise-induced hearing loss. The DMA related that, during the federal employment from December 20, 1984 to August 2, 1988, appellant was exposed to potentially hazardous noise levels (above 85 decibels). He also noted that, from August 3, 2008 to the present, appellant was exposed to noise levels that were below the hazardous limits (two hours a day at 82 decibels). The DMA also noted that hearing tests from February 14, 1985 through April 1, 1999 revealed normal hearing in the left ear and mild-to-moderate high frequency loss in the right ear. He reiterated that “this is a preexisting condition and unrelated to [f]ederal [e]mployment).” The DMA noted that industrial hearing tests from February 14, 1985 through April 1, 1991 provided no significant high frequency change in either ear (as defined as 15 decibels or greater in any high frequency in either ear). He indicated that any hearing changes after the 1991 testing was unrelated to federal employment as federal workplace noise exposures were below hazardous noise levels. The DMA opined that, based upon the medical evidence provided, appellant had preexisting conditions responsible for the right ear hearing loss and his left ear hearing was normal. He also indicated that appellant’s preexisting hearing loss was not aggravated by his federal workplace noise exposures.

By decision dated February 8, 2016, OWCP denied appellant’s claim for compensation as the medical evidence of record failed to establish that the claimed condition was causally related to the accepted federal employment factors.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for

³ *Supra* note 1.

⁴ Gary J. Watling, 52 ECAB 357 (2001).

which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by a claimant.

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment, nor the belief that the condition was caused, precipitated, or aggravated by his employment, is sufficient to establish causal relationship.⁶ The mere fact that a disease or condition manifests itself or worsens during a period of employment⁷ or that work activities produce symptoms revelatory of an underlying condition⁸ does not raise an inference of causal relation between the condition and the employment factors.

ANALYSIS

It is undisputed that appellant was exposed to work-related noise from December 20, 1984 to the present in varying levels. It is also undisputed that he worked for the U.S. Air Force in flight line maintenance and was exposed to jet engine noise eight hours a day, five days a week from 1974 to 1976 and that he had a service-connected disability. The record also reflects that appellant had a preexisting right ear condition.

The second opinion physician Dr. Bandy provided a November 17, 2015 report in which he found significant hearing loss in the right ear, mixed type, and a good cochlear reserve in both ears. When asked if appellant showed sensorineural hearing loss in excess of what would be expected on the basis of presbycusis, he responded: "yes to a certain extent." Dr. Bandy also responded "yes" in regard to whether the sensorineural hearing loss was due to his federal employment and whether he recommended a hearing aid for the right ear.

On October 30, 2015 OWCP requested that its DMA review the SOAF and medical records and provide an opinion on whether appellant sustained hearing loss causally related to factors of his federal employment and, if so, whether it was ratable permanent impairment.

In his January 17, 2016 report, the DMA noted the history of injury, reviewed the medical records, and reviewed the SOAF. He concluded that appellant's hearing loss was not

⁵ *Solomon Polen*, 51 ECAB 341 (2000).

⁶ *Robert G. Morris*, 48 ECAB 238-39 (1996); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁷ *William Nimitz, Jr.*, *id.*

⁸ *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

caused or aggravated by his federal workplace noise exposures. The DMA noted that appellant had a history of right ear disease requiring a tympanoplasty which he determined was responsible for the preexisting right ear hearing loss as exhibited on the first audiometric test performed at the employing establishment in 1985. As this first testing occurred only two months after appellant commenced his federal employment, the DMA determined that the preexisting hearing loss was not caused or aggravated by workplace exposures. He noted that no significant hearing loss had occurred between 1985 and 1991 based upon audiometric testing. The DMA commented that from December 20, 1984 to August 2, 1988 claimant was exposed to hazardous noise and that after 1991 he was not exposed to hazardous noise levels. He opined that any changes to appellant's hearing after the 1991 testing were unrelated to federal employment factors because the workplace exposures to noise were below hazardous noise levels.

The Board finds that the opinion of the DMA did not fully account for the noise exposures as set forth in the SOAF. The SOAF indicated that from December 20, 1984 to December 14, 1985 when appellant worked as a laboratory worker, he was exposed to an average of between 84.2 and 92.7 decibels of noise without ear protection; from December 15, 1985 to August 2, 2008 when he worked as an animal caretaker, he was exposed to an average of between 84.2 and 92.7 decibels of noise with mandatory hearing protection; and from August 3, 2008 to the present, when working as a biological science laboratory technician (Animal) he was exposed to an average of 82 decibels of noise with mandatory hearing protection. He was also exposed to jet engine noise eight hours a day, five days a week from August 1974 to July 1976 when working for the U.S. Airforce. OWCP's DMA did not account for each of these noted periods of noise exposure, nor did he explain whether such exposures were sufficient to cause or aggravate hearing loss.

It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP sends medical records and a SOAF to its DMA and provides a list of questions for resolution, that physician's opinion must be based on a complete and accurate factual and medical background.⁹ Here, the DMA did not base his decision on the SOAF.

To assure that a report of a medical specialist is based upon an accurate factual background, OWCP provides information to the physician through the preparation of a SOAF.¹⁰ Its procedures provide the necessary information to be contained within the SOAF in order to provide the physician with a complete and accurate factual history upon which to base his or her opinion.¹¹ When the physician renders a medical opinion based on an incomplete or inaccurate history, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished.¹²

⁹ V.C., Docket No. 14-1912 (issued September 22, 2015).

¹⁰ See A.T., Docket No. 14-153 (issued July 2, 2014).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹² See A.R., Docket No. 11-692 (issued November 18, 2011); *Willa M. Frazier*, 55 ECAB 379 (2004).

The Board thus finds that the January 17, 2016 report of OWCP's medical adviser is insufficient on the issue of causal relationship and permanent impairment because the medical opinion is not based on the SOAF. The Board notes the second opinion physician, Dr. Bandy, advised that appellant's hearing loss was caused or aggravated by appellant's employment and indicated that there were findings in excess of that expected from presbycusis.

It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence.¹³ Thus, the Board finds that this case is not in posture for decision and must be remanded for further development. After such further development as it deems necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: September 12, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ P.K., Docket No. 08-2551 (issued June 2, 2009).